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JOHN F. DAVIS, CL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 189

ITION NOT PRINTED

ONSE NOT PRINTED

JAMES MINOR,

*Petitioner,*

*vs.*

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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✓  
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Petitioner's Fifth Amendment Right Against Self-Incrimination Is Violated by the Provisions of 26 U.S.C. §4705 and the Regulations Thereunder Which Permit Him to Transfer Heroin Only Pursuant to a Written Order Form and Compel Him, in Connection Therewith, to Reveal Incriminating Information .....	5
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BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit (App. 22-31)<sup>1</sup> is reported at 398 F. 2d 511 (1968).

No opinion was rendered by the District Court.

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<sup>1</sup> "App." references are to the separate appendix filed pursuant to Rule 36 of this Court. The appendices to this brief will be cited as "Appendix A," etc.

## **Jurisdiction**

The judgment of the Court of Appeals for the Second Circuit was entered on July 3, 1968 (App. 32). On July 24, 1968, an extension of time to file a petition for writ of certiorari was granted and the petition was filed on August 27, 1968. The petition for writ of certiorari was granted on June 2, 1969 (App. 33).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **The Constitutional Provisions, Statutes and Regulations Involved**

### **UNITED STATES CONSTITUTION, AMENDMENT V**

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

### **STATUTES**

The text of the statutes involved is set forth in Appendix A. The statutes are 26 U.S.C. §§4701, 4703-05, 4721-22, and 4724.

### **REGULATIONS**

The text of the regulations involved is set forth in Appendix B. The regulations are 26 CFR §§151.141-147, 151.161-167, 151.181, 151.185-190, 151.201, and 151.211.

### Question Presented

Whether the provisions of 26 U.S.C. §4705 and the regulations thereunder prohibiting petitioner from transferring heroin without receipt of a written order form and requiring him, in connection therewith, to reveal incriminating information violate petitioner's right against self-incrimination.

### Statement of the Facts of the Case

Petitioner was charged in a two count indictment (App. 34) with violation of the federal narcotics laws in that on two occasions he sold heroin to an undercover federal narcotics agent (App. 8-10) not pursuant to a written order form (App. 17-18). Petitioner was convicted of both counts and sentenced to concurrent terms of five years in prison.

On appeal to the United States Court of Appeals for the Second Circuit, petitioner challenged the validity of the conviction, arguing that compliance with the order form provisions compelled him to reveal incriminating information in violation of his Fifth Amendment right as that right is interpreted by *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968) and *Haynes v. United States*, 390 U.S. 85 (1968).<sup>2</sup>

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<sup>2</sup> Although no objection on this ground had been taken in the District Court, the Court of Appeals considered the issue on the merits, relying on the decision in *Grosso v. United States*, *supra*, 390 U.S. at 70-71. Further, as was the situation in *Leary v. United States*, 395 U.S. 6, 27 (1969), the trial in this case was begun and concluded, the sentence imposed, and the notice of appeal filed prior to the decisions in *Marchetti*, *Haynes*, and *Grosso*, and the Court of Appeals for the Second Circuit had previously rejected a similar self-incrimination claim in *United States v. Marchetti*, 352 F. 2d 848 (1965).

The Court of Appeals affirmed the judgment on the ground that 26 U.S.C. §4705(a) could be treated separately from the other provisions of §4705 relating to the order form. The Court further found that the statute is not primarily directed at those inherently suspect of criminal activities but is part of the scheme designed to regulate lawful business. For these reasons, the Court held that petitioner's right against self-incrimination was not violated.

### **Summary of Argument**

The narcotic drug order form provisions, set forth in §4705 and the regulations thereunder, must be treated as an integral whole. These provisions violate petitioner's right against self-incrimination because the scheme requires that he act only pursuant to the order form and compels him to record incriminatory information on the form, to retain the form for two years, to keep it available for inspection, and to send a copy to the Treasury Department. Legislative history and judicial treatment of the order form provisions, as well as a meaningful reading of the statute, establish that §4705(a) should not be treated as separable from the remainder of §4705. Since all contacts with heroin are unlawful, the seller of heroin is inherently suspect of criminal violations, and the order form provisions cannot be applied to him without violating his Fifth Amendment rights.

## A R G U M E N T

**Petitioner's Fifth Amendment Right Against Self-Incrimination Is Violated by the Provisions of 26 U.S.C. §4705 and the Regulations Thereunder which Permit Him to Transfer Heroin Only Pursuant to a Written Order Form and Which Compel Him, in Connection Therewith, to Reveal Incriminating Information.**

Petitioner was convicted for transferring heroin other than "in pursuance of a written order form of the person to whom" it was sold in violation of 26 U.S.C. §§4705(a) and 7237(b).<sup>3</sup> As applied to petitioner, the statute is unconstitutional because the order form provisions violate his right against self-incrimination by compelling him to disclose information that creates "real and appreciable . . . hazards of self-incrimination." *Marchetti v. United States*, 390 U.S. 39, 48 (1968); *Leary v. United States*, 395 U.S. 6 (1969); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).

### A. THE STATUTORY SCHEME REGULATING TRAFFIC IN NARCOTICS.

The statutory scheme of Title 26 and the related provisions of the Code of Federal Regulations provide for an occupation tax and registration, an excise tax, and the order form. Section 4721 requires that every person who imports, manufactures, produces, compounds, or sells either as wholesaler or retailer, deals in, dispenses or gives away narcotic drugs<sup>4</sup> shall pay an annual special

<sup>3</sup> Section 7237(b) is the penalty provision.

<sup>4</sup> Narcotic drug is defined to include opium and its derivatives [§4731(a)], such as heroin. See Maurer & Vogel, *NARCOTICS AND NARCOTICS ADDICTS* 69 (3d ed. 1967). This does not include marijuana.

(occupation) tax, and §4722 requires that each of these people register<sup>5</sup> with the Secretary of the Treasury. See also 26 CFR §151.21.

An excise or commodity tax is imposed by §4701 on all narcotic drugs produced in or imported into the United States, and sold or to be used for consumption. This tax is to be paid by the importer, manufacturer, producer or compounder. However, each time a new compound or derivative is produced (26 CFR §151.121) or a drug is repackaged (26 CFR §151.122) a new tax must be paid. Payment of the tax is evidenced by stamps issued by the Secretary of the Treasury (§4771) on requisition of registered persons (26 CFR §151.130) and affixed to the bottle or container in such a way as to seal it (§4703). It is unlawful to purchase, sell, distribute or dispense narcotics except in or from the original stamped package (§4704) and possession of the package without the stamps is prima facie evidence of guilt.

Section 4705(a) makes it unlawful to sell or transfer narcotics except in pursuance of a written order form<sup>6</sup> presented by the buyer or transferee to the seller. See also 26 CFR §151.141. This order form can be obtained only by persons who have registered and paid the occu-

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<sup>5</sup> Title 26 U.S.C. §4731(c), (d), (e) (1964) and 26 CFR §§151.11 (e), (h); 151.21; 151.41-48 specifically indicate all those who must register. Included, in addition to those listed above, are hospitals, colleges of pharmacy, medical or dental clinics or other institutions, physicians, dentists, veterinary surgeons, or anyone who might legally dispense narcotics to patients, and chemists.

<sup>6</sup> Exceptions are listed in §4705(b) and (c). They are the dispensing of narcotics by a physician to a patient, the dispensing of narcotics pursuant to a prescription of a physician, the exporting of narcotics, and the transfer of narcotics to agents of any government body buying for use by government agencies.

pation tax under §§4721 and 4722 [§4705(f); 26 CFR §151.142].

Order forms are issued in triplicate (26 CFR §151.161) to prospective purchasers or transferees who are registered (26 CFR §151.142) upon the filing of an application (26 CFR §151.143). When a purchaser desires to buy narcotics, he must fill in the date of the order, fill in the items and amount ordered and sign the form (26 CFR §§151.163, 151.167). The original and the triplicate are then given to the vendor or transferor who is to supply the narcotics in compliance with the order (26 CFR §151.161). It is stated in 26 CFR §151.181 that only registered importers, manufacturers, producers, compounders or wholesale dealers can supply narcotics pursuant to such an order form.<sup>7</sup>

The transferor enters upon the original and triplicate form, both of which are in his possession, the number and size of the packages furnished on each item and the date on which the order is filled:

"A notation, covering each shipment, showing the actual quantities supplied and the date of delivery, shall be made by the vendor on the original and triplicate and by the vendee on the duplicate."

#### 26 CFR §151.185

The order form itself (Appendix C) also directs the vendor to make these entries.

Every person who accepts an order form and who makes the transfer must keep the order form for 2 years and must make it accessible for inspection by agents of any

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<sup>7</sup> As to the validity of this regulation, see, *infra*, footnote 11.

state or local government enforcing narcotics laws [§§4705 (d), 4773; 26 CFR §§151.201, 151.479(b)]. The vendor is required to send the triplicate to the regional director of the Internal Revenue Service of the district in which the vendor is located [26 CFR §§151.201, 151.11(d)].

The order form itself is addressed to the vendor, and his name and address is to be inserted on the form. Neither the statutes nor the regulations make it clear whose obligation it is to fill in the vendor's name and address in the spaces provided. Also, it is not specified when this information must be placed on the form, except that it is apparent that it must be set forth prior to sending the form to the Secretary of the Treasury.\*

**B. THE INFORMATION THAT PETITIONER WAS REQUIRED TO PLACE ON THE ORDER FORM WAS SELF-INCRIMINATORY.**

If petitioner had complied with the order form procedure required by the statute and regulations, he would have incriminated himself because of the entries that he, in his position as the vendor, was obliged to make on the order form. He was required to state the amount of narcotics he transferred and to furnish the date on which the transfer took place. Thus, whether petitioner himself or his vendee had to put petitioner's name on the form, the form would have revealed petitioner's identity and he, himself, would have supplied the remaining incriminatory information specifically admitting his possession of heroin. Admission of possession would have established a prima facie violation of §4704(a) (possession of narcotics out-

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\* If it is the vendor who has to insert his name on the form, the time at which this has to be done does not affect the self-incriminatory nature of the information. *Marchetti v. United States, supra*, 390 U.S. at 52-53.



side of the original stamped package) and 21 U.S.C. §§173-4 (unlawful importation of narcotics). Further, where the sale involved interstate commerce, the vendor would also have acknowledged violation of §4724(b). In addition to federal controls over narcotics, every state prohibits any dealing with or possession of narcotics, unless the person is properly licensed.\* The New York statutes are most relevant here since the evidence showed the transfer occurred in New York. Section 3305 of the N. Y. Public Health Law (McKinney 1954), which is the same as §2 of the Uniform Narcotic Drug Act, makes it unlawful for any person to manufacture, possess, control, sell, prescribe, administer, dispense or compound any narcotic drug except as authorized. Further, N. Y. Penal Law §220.15 (McKinney 1967) makes it a felony to possess heroin in an amount more than  $\frac{1}{8}$  of an ounce and all other narcotic drugs in an amount more than  $\frac{1}{2}$  ounce. Since the order form would have been available to state narcotics officials, from it they could have ascertained, not only that petitioner had been in possession of narcotics, but the quantity he had possessed.

By complying with the requirements relating to the form, petitioner would have supplied "a significant link in the chain of evidence tending to establish his guilt" (*Marchetti v. United States, supra*, 390 U.S. at 48) in prosecutions pursuant to both federal and state statutes, and he would

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\* All states and the District of Columbia have statutes prohibiting possession of narcotic drugs. Thirty-eight have adopted Section 2 of the Uniform Narcotic Drug Act, 9B Uniform Laws Ann. 423 (1966). Section 1(14) of the Act, 9B Uniform Laws Ann. 417, defines narcotic drug as any drug the importation, exportation, or possession of which is regulated by federal narcotics laws on the date of the transaction involved.

have been exposed to the risk of self-incrimination within the meaning of *Leary, Marchetti, Grosso and Haynes*.

The reasoning of *Leary v. United States, supra*, is particularly appropriate to this case. In *Leary*, the Court rejected the government's position that an unregistered applicant for an order form who attempts to pay the transfer tax under §4741 could not get the form and therefore would not reveal incriminating information. The Court stated that in the course of paying the tax necessary to transfer marijuana in accord with §4741, the unregistered buyer<sup>10</sup> had to reveal he was in violation of other statutes. Section 4705, like §4741, is applicable to all sales, whether the seller is permitted to register under §4722 or not. *Nigro v. United States*, 276 U.S. 332 (1928).<sup>11</sup> Thus, in the course of following the order form procedures required to make a transfer of narcotics in accord with §4705, the unregistered seller is forced to provide information revealing violations of other statutes.

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<sup>10</sup> As noted in *Leary*, the purchaser of narcotics can obtain the form only if he is registered, while a purchaser of marijuana can obtain the form even if he is unregistered by paying an additional fee. 395 U.S. at 21-22.

<sup>11</sup> It is stated in 26 CFR §151.181 that an order can be filled only by a person who is registered. This regulation does not appear in the first regulations, issued in 1915. T.D. 2126, 17 Treas. Dec. Int. Rev. 19 (1916). It appears in different language in the 1919 revised regulations: "The order forms are intended solely for the transfer of narcotic drugs and preparations from one registered person to another. They must not in any case be used as prescriptions." Int. Rev. Reg. No. 35, Art. 107 (1919), compiled in 4 Fox, Int. Rev. Regs., No. 35 at 48. To the extent that this regulation is in conflict with the language and intent of §4705 it is invalid. *Leary v. United States, supra*, 395 U.S. at 23-25.

**C. SECTION 4705(a) MUST BE CONSTRUED IN CONJUNCTION WITH THE REMAINDER OF §4705 AND THE REGULATORY PROVISIONS RELATING TO THE ORDER FORM.**

The Court of Appeals sustained petitioner's judgment of conviction by crediting the government's argument that §4705(a) alone does not require the disclosure of information by the seller. The Court held that §4705(a) should be construed independently of the provisions requiring that information be disclosed and recorded, and that the form be filed and held for inspection. The assumption of the Court of Appeals was that §4705(a) was separable from the other provisions because it served an independent congressional purpose, ensuring

"that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes imposed under 26 U.S.C. §§4701 and 4721."

398 F. 2d 511, 515.<sup>12</sup>

The Court's holding is not consistent with the legislative and judicial history of the statute. These sources establish that §4705(a) was intended to be considered together with the other provisions of §4705 that require information be given on the order form and that the form be filed and available for inspection.

The Harrison Narcotics Act of 1914, 38 Stat. 785 (1914), including what is now §4705, was passed after the meetings

<sup>12</sup> After the Court of Appeals determined that §4705(a) should be treated *in vacuo*, it concluded that any danger of self-incrimination fell only upon the purchaser who applied for the order form from the Treasury. Therefore, since the right was personal, petitioner's rights were not violated. This is a spurious issue if §4705 is treated as an entity for petitioner himself must place incriminating information on the form.

of the International Opium Commission in 1911 and after the signing of the Hague Convention of January 23, 1912.<sup>13</sup> The report of the American delegation to the 1911 meeting indicates the broad purposes intended for any scheme of internal control of narcotics in the United States. After detailing the facts as to the increased use of opium and cocaine for non-medical purposes, and discussing the Opium Exclusion Act of 1909 (35 Stat. 614, ch. 100, §2) which limited the importation of opium, the report states:

"In the practical working of this [Opium Exclusion] Act and regulations issued under it, legally imported opium is almost immediately lost sight of on leaving the customhouse; for, although the importer may import in good faith and sell to the manufacturer or jobber in equally good faith, it is not possible for any of them to guarantee that the ultimate receiver or seller of the drug in interstate commerce is handling it for strictly medical purposes. . . . A proposed bill to supplement [sic] this defect in the act by placing the interstate traffic in opium and other habit forming drugs under federal control will be submitted." [Emphasis added.]<sup>14</sup>

The legislative reports on the bill which subsequently became the Harrison Act took the same position. The report of the Senate Finance Committee (which adopted in full the report of the House of Representative Committee on Ways and Means) shows that Congress recognized the

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<sup>13</sup> Note, *Narcotics Regulation*, 62 Yale L.J. 751, 760, 761 n. 61 (1953).

<sup>14</sup> THE INTERNATIONAL OPIUM COMMISSION AND THE OPIUM PROBLEM IN THE UNITED STATES, S. Doc. No. 377, 61st Cong., 2d Sess., 55 (1910).

significance of the problem and chose to use its taxing power for the purpose of controlling the flow of narcotics and aiding the states in the enforcement of their narcotics control statutes:

"... There is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the states more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels.

. . . . .

The different States of the Union, by pharmacy laws, made most strenuous efforts to prevent the indiscriminate sales of narcotics—most of the States requiring that these drugs be sold only upon the prescription of physicians. But these laws have been ineffective because of the failure of the Federal Government to control the importation and interstate traffic in the drugs. It is the unanimous view of the State, Territorial, and municipal officials charged with police laws aimed at the traffic in narcotics that these laws will remain ineffective to a large extent until the Federal Government acts in support of them.

It may be said that no individual has ever represented to the Committee on Ways and Means that the present extensive traffic in narcotics should be allowed to continue. The opinion of in fact everyone except illicit dealers is that the traffic ought to be greatly diminished, and that narcotics should be confined to legitimate medical channels. The only question at issue has been how best to do it. During the past five years

the United States Opium Commission has made a thorough canvass of [those who deal in and consume narcotics and State officials] . . . and as a result and in conjunction with a committee of representatives of the Department of State, the Treasury Department, and the Department of Justice, it has been decided by them that only by customs law and by the exertion of the Federal taxing power can the desired end be accomplished. In that opinion your committee concur."

S. Doc. No. 258, 63rd Cong., 2nd Sess., 2, 4 (1914).

The occupation tax and registration requirements (now §§4721 and 4722) were enacted as §1 of the Harrison Act; the order form provision was §2. In addition to requiring payment of a tax and registration, §1 prohibited all activities involving narcotics without registration. This criminal provision apparently was intended by Congress to apply to all persons, even those who were not eligible to register.<sup>15</sup> The order form provisions, substantively unchanged to the present, were part of the original legislation passed to control transactions in narcotics through taxation, including criminal provisions. The direction that the form be retained for two years by both parties, and available for inspection was part of the original §2.<sup>16</sup>

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<sup>15</sup> In *United States v. Jin Fuy Moy*, 241 U.S. 304 (1916), it was held that the criminal provision of §1 applied only to those who were eligible to register but who had not done so. Congress was concerned that the decision weakened the effect of §1 [H.R. Doc. No. 767, 65th Cong., 2nd Sess., 56 (1918)] because no punishment was provided for illegal transferees who were not required to register. To correct this, the excise (commodity) tax applicable to all transactions was added by the Revenue Act of 1918, ch. 18, Title X, §1006, 40 Stat. 1130 (now §4701).

<sup>16</sup> Except for the list of those transactions which could be carried out without the order form, Section 2 of the Harrison Act, which

Article 16 of the original regulations issued by the Treasury Department to administer the Harrison Act states:

"It will be the duty of agents and other inspecting officers appointed under the provisions of section 10 of the act named to visit at irregular intervals the premises of all persons, firms, or companies registering under said act, or where they have reason to believe drugs of the character defined are stored, and . . . they will, under the authority conferred by sections 2 and 5 of the act, inspect and, when necessary, verify such records, orders, prescriptions, statements, or returns made or received, and they will at once report for prosecution any violations of the law discovered by them."

T.D. 2126, 17 Treas. Dec. Int. Rev., *supra*, at 29.

The 1919 revised regulations state the purpose of the order form to be of similar import:

"Art. 100. Purpose of order forms.—Order forms are required to be used so that transfers of narcotic drugs from one person to another may be traced and the proper person held responsible in case of their misuse."

4 Fox, Int. Rev. Regs., No. 35, at 47.

Thus, the intent of Congress and the Treasury Department to establish the order form as a record-keeping device to assist in the enforcement of the occupation tax and the

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included both the order form requirement now found in §4705(a) and the retention and inspection requirements now found in §4705 (d) and (e) was enacted without subdivisions.

related criminal penalties is manifest. After 1919, the form served the same purpose with respect to the excise (commodity) tax. Further, as a record-keeping tool, it directly aided the states in the enforcement of their narcotics legislation, fulfilling Congress' specific intent. Only if all the provisions are interpreted as a whole are the record-keeping and inspection provisions meaningful. Congress' clear statement as to the purpose of the statute, as well as the language and form of the original provisions, establishes that §4705(a) cannot be treated as a severable sub-section.

While Congress viewed the Harrison Act as a measure to control narcotics traffic, courts have been concerned with it as a revenue statute, upon which status its constitutionality was thought to be dependent.<sup>17</sup> Since the order form provision is not in itself a taxing measure, this Court consistently held that it was integrally connected with the other sections of the Act as a measure to enforce payment and collection of the tax, or as a means of disclosing its evasion. The Court has thus treated all aspects of the order form requirement, including its receipt, completion and retention for inspection, as part of a single enforcement tool.

In *United States v. Doremus*, 249 U.S. 86 (1919), the defendant, a registered physician, was charged with a sale of heroin not in pursuance of a written order form, and not in the regular course of his professional practice (an exception to the order form requirement). The order form provision was challenged and held unconstitutional by the district court as not being a revenue measure. This Court reversed the decision stating:

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<sup>17</sup> It was held not to be an exercise of the treaty-making power. *United States v. Jin Fuey Moy*, *supra*, 241 U.S. at 401.



"That Congress might levy an excise tax upon such dealers and others who are named in §1 of the act cannot be successfully disputed. The provisions of §2 [§4705], to which we have referred, aim to confine sales to registered dealers and to those dispensing drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above-board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers, and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Amerus [the recipient of the narcotics], being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

"We cannot agree with the contention that the provisions of §2, controlling dispositions of drugs in the ways described, can have nothing to do with facilitating the collection of the revenue . . . ."

In sustaining the order form provision, this Court essentially adopted the argument of the government that the order form provision was required in narcotics dealings "so as to secure that both [the transferor and transferee] should so register and pay the tax." 249 U.S. at 87.

In *United States v. Balint*, 258 U.S. 250 (1922), the issue was whether the order form provision had to be complied with although the seller did not know the substance involved in the transaction was a narcotic. The Court again held that the order form provision was a method of enforcing the relevant tax statutes:

"The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs. [Citations omitted] . . . It is very evident from a reading of it [§2] that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it *merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic*. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." [Emphasis added.]

258 U.S. at 253-4.

The relationship is fully explored in *Nigro v. United States, supra*. There, the unregistered transferor sold to the buyer without a written order form. The issue was

whether the written order form provision applied to an unregistered seller who was not required or permitted to register. Concluding that the provision applied to all sellers, the Court stated that, in order to sustain the statute

“Everything in the construction of §2 must be regarded as directed toward the collection of the taxes imposed in §1 and the prevention of evasion by persons subject to the tax. If the words cannot be read as reasonably serving such a purpose, §2 cannot be supported.”

276 U.S. at 341-2.

Rejecting an argument that an unregistered seller would be guilty of two crimes if the order form provision applied to him, the Court went on to state that a second reasonable restriction was justifiable as long as

“such a restriction should be fairly adapted to obstruct the successful accomplishment of the main crime, or furnish means of detecting the guilty person . . . .

“It would seem to be admissible and likewise, in a law seeking to impose taxes for the sale of an elusive object, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, any departure from the steps enjoined may be punished, and added penalties may be fixed for successive omissions, but all for the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax.”

276 U.S. at 344-5.

The Court then referred to the subsequently added excise (commodity) tax and stated that the order form provision should "apply to all persons so as to be helpful in promoting the detection of evasion from the added tax imposed under the new §1" (276 U.S. at 347) and concluded by saying:

"The order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on, or else it is a means of discovering the illegality and is useful for the latter purpose."

276 U.S. at 351.

An examination of the statutes and regulations indicates that, as this Court said in *Grosso, supra*, 390 U.S. at 65, there is nothing in them that contemplates the receipt of the order form and the supplying of narcotics, without the subsequent filing of the form with the requested information written thereon. The form itself is prepared by the Secretary of the Treasury [§4705(f)], and it requires that the vendor insert information concerning the sale and, as is clear from the reverse side, directs that the supplier of the drugs send the triplicate to the district supervisor. Further, the reverse side of the original and triplicate forms are used to endorse the order over to another transferor if the first transferor cannot supply the items requested by the transferee (26 CFR §151.189). The endorsement shows the name and address of the new transferor, as well as the signature, registry number and complete address of the original transferor, whose name is apparently already on the front of the form.

These details of the record-keeping aspect of the order form demonstrate that this function cannot be separated

from its receipt at the time of the sale. It does not matter whether the purpose of the order form requirement is viewed as a necessary aid to collecting and enforcing federal taxes, discovering their evasion, assisting states in the enforcement of their narcotic provisions, or controlling the flow of narcotics through criminal penalties. Any of these purposes would necessitate compliance with the completion, record-keeping and filing aspects of the order form requirement.<sup>18</sup>

The position taken in *Grosso v. United States, supra*, was that the validity of a criminal prosecution for failure to pay an excise tax under the gambling provisions of Title 26 could be determined only after the hazards of incrimination were considered in light of "literal and full compliance with all statutory requirements." 390 U.S. at 65. A similar evaluation is required here and demands a reversal of the judgment.

**D. THE ORDER FORM PROVISIONS, AS APPLIED TO PETITIONER, ARE DIRECTED TO A GROUP INHERENTLY SUSPECT OF CRIMINAL ACTIVITIES.**

The Court of Appeals also held that the order form provision was not in violation of the Fifth Amendment because it was not directed to a group of persons inherently sus-

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<sup>18</sup> The purpose and importance of the order form as a record-keeping device is highlighted by a 1948 change in the Code of Federal Regulations. Initially, the order forms were issued in duplicate—one for the vendee and one for the vendor. The change required that they be prepared in triplicate, with one copy sent to the Internal Revenue Service "in order to provide a more prompt check of purchases and sales of narcotic drugs . . . ." 14 Fed. Reg. 519 (1949).

pect of criminal activities.<sup>19</sup> In support of its position, the Court of Appeals referred to statistics reflecting the volume of legitimate business dealings in narcotic drugs.

This holding is incorrect because petitioner was accused of transferring heroin and there is no legitimate trade in that drug. All contacts with heroin are unlawful under federal law. It is illegal to grow opium poppies without a license<sup>20</sup> (which license apparently has never been issued<sup>21</sup>); to import heroin into the United States (the statute permits importation of only crude opium);<sup>22</sup> to manufacture heroin in the United States;<sup>23</sup> and to possess heroin.<sup>24</sup> See also U.S. Treas. Dept., Bureau of Narcotics, *TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS* 11 (1959).

The purpose of these statutes is clearly articulated by Congress:

“Heroin, the most addicting of all narcotic drugs, should be completely outlawed in the United States as is in

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<sup>19</sup> Direction of the form to those inherently suspect of criminal activities has been found necessary by this Court to avoid the application of the required records doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). See *Marchetti v. United States*, *supra*, 390 U.S. at 55-57. Two other elements of the required records doctrine were treated minimally in *Marchetti* (390 U.S. at 57), *Grosso* (390 U.S. at 68-69) and *Haynes* (390 U.S. at 98-99), and not at all in *Leary*. In any case, those elements are not present here. The statute does not require that petitioner keep records that he customarily kept, and the forms have no more “public aspects” than do the registration forms in *Marchetti*, *Haynes*, and *Grosso*.

<sup>20</sup> 21 U.S.C. §188.

<sup>21</sup> The President’s Advisory Commission on Narcotic and Drug Abuse, *Final Report*, 34 (1963).

<sup>22</sup> 21 U.S.C. §173.

<sup>23</sup> *Id.*

<sup>24</sup> 18 U.S.C. §1402.

most nations of the world. Heroin has no medical value that is not better served by legitimate drugs and, because of its addicting qualities, it is not used in the practice of medicine in the United States. It is now unlawful to import or to produce heroin in this country, but there are some small supplies of heroin legally held by hospitals and druggists. This should be surrendered at fair compensation so that the drug will be completely outlawed in our country."

S. Rep. No. 1997, 84th Cong., 2d Sess., 7 (1956).

In light of this absolute prohibition on heroin, the application of the order form provisions to heroin transactions directs the form at a "group inherently suspect of criminal activities," and must result in self-incrimination.

The statistics cited by the Court of Appeals to justify its conclusion that the order form provisions regulate legitimate business have no significance, when, as here, heroin is the narcotic involved.

Moreover, the situation here is comparable to that in *Leary v. United States, supra*. At the time Leary failed to register and obtain the order form for marijuana, it was illegal, with certain exceptions, in most states to possess marijuana. The Court found that, of those who were permitted under state law to possess marijuana, most were required under federal law to register and pay the occupation tax, and the remainder were exempt from federal registration. Further, the Court found that, due to the heavy criminal penalties involved, it was extremely unlikely that those who were required to register under federal law would fail to do so. The Court concluded that

those who might legally possess marijuana under state law were "virtually certain" to be registered under federal law or exempt, and thus also might legally possess marijuana under federal law. Therefore

"the class of purchasers who were both unregistered and obliged to register to obtain an order form constituted 'a select group inherently suspect of criminal activities.'"

*Leary v. United States, supra*, 395 U.S. at 18.

The same reasoning is applicable to this case because under New York law, the exceptions to the prohibition on the possession of narcotics are (1) manufacturers, processors, growers, cultivators, wholesalers;<sup>25</sup> (2) hospitals, laboratories, and dispensaries;<sup>26</sup> (3) physicians, dentists, veterinarians, those in charge of hospitals or laboratories, and government agents;<sup>27</sup> (4) licensed pharmacists;<sup>28</sup> (5) persons receiving narcotics from a physician, dentist, druggist, veterinarian.<sup>29</sup>

A comparison of the New York statute with the federal statutes and regulations defining those who must register or who are exempt from registration<sup>30</sup> shows that substan-

<sup>25</sup> N. Y. Public Health Law §§3310, 3301 (19)-(22) (McKinney Supp. 1968-9).

<sup>26</sup> N. Y. Public Health Law §§3311, 3301 (23)-(28) (McKinney Supp. 1968-9).

<sup>27</sup> N. Y. Public Health Law §3330 (McKinney 1954); §3301 (11)-(15) (McKinney Supp. 1968-9).

<sup>28</sup> N. Y. Public Health Law §§3320, 3301 (16)-(17) (McKinney Supp. 1968-9).

<sup>29</sup> N. Y. Public Health Law §3331(1) (McKinney Supp. 1968-9).

<sup>30</sup> See footnote 5, *supra*, and related text.



tially the same persons must register under both. Applying the reasoning of *Leary v. United States, supra*, it is fair to assume that those who might legally possess narcotics were "virtually certain" to be registered or exempt. Thus, compliance with the order form provisions would have "required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group" (395 U.S. at 18) who were both unregistered and obliged to use the order form provisions.

### Conclusion

For the above-stated reasons, the judgment below must be reversed.

Respectfully submitted,

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